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In The

Supreme Court of the United States

October Term, 1965

MIDWEST LAUNDRY EQUIPMENT CORP.,
Petitioner,

vs.

MAURICE BERG AND JUNE BERG,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

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vs.

MAURICE BERG AND JUNE BERG,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEBRASKA

Midwest Laundry Equipment Corp., your petitioner, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nebraska, entered in the above-entitled case on May 28, 1965.

OPINIONS BELOW

The District Court of Lancaster County, Nebraska did not render any opinions in this case. The first opinion of the Supreme Court of Nebraska is reported at 175 Neb. 423, 122 N. W. 2d 250. The second opinion of the Supreme

Court of Nebraska is reported at 175 Neb. 874, 124 N. W. 2d 699. The third opinion of the Supreme Court of Nebraska has not yet been officially reported, but is unofficially reported at 135 N. W. 2d 457. All of these opinions are reprinted in Appendix A.

JURISDICTION

The judgment of the Supreme Court of Nebraska, of which review is sought by petitioner, was entered on May 28, 1965 (R. 54).* A motion for rehearing was filed on June 16, 1965 (R. 69), and was overruled on July 9, 1965 (R. 70). The jurisdiction of this Court is invoked under 28 U. S. Code, Sec. 1257(3).

QUESTIONS PRESENTED

1. Whether the refusal of the highest court of a state to permit a litigant to file a brief on a point of law arising during the pendency of an appeal constitutes a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution.

2. Whether the refusal of the highest court of a state to review a decision on a point of law which was raised during a previous appeal of the case, but on which the appellate court refused to give the parties a hearing, constitutes a denial of due process of law, in violation of the Fourteenth Amendment to the Constitution.

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* Note: Because there were two appeals to the Supreme Court of Nebraska, the record is in two parts. The main body of the record bears docket No. 35888, and will be referred to in the usual manner. The supplemental record bears docket No. 35409, and will be referred to herein by the abbreviation "S. R."

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part as follows:

> "• • • nor shall any State deprive any person of life, liberty, or property without due process of law; • • •"

The Nebraska statutes involved in the first opinion of the Supreme Court of Nebraska were Sections 45-138 and 45-155, R. R. S. 1943 (Reissue of 1960). The cited sections were repealed on November 15, 1963, and were replaced by Sections 45-138 and 45-155, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965. The amending act included a further provision codified as Section 45-155.01, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965. All of the foregoing sections are set forth in Appendix B.

STATEMENT OF THE CASE

This is an action brought by respondents in the District Court of Lancaster County, Nebraska. Respondents were the purchasers of a substantial quantity of laundry equipment from petitioner. The purchase price of the equipment exceeded $25,000.00. Respondents alleged in their petition (R. 3-10) that the retail installment contract between themselves and petitioner violated the Nebraska Installment Loan Act, and was void. Prior to the filing of suit, petitioner had assigned the retail installment contract to Industrial Credit Company, of St. Paul, Minnesota. Industrial Credit Company was named as a defendant, and participated in the trial and the first appeal to

the Supreme Court of Nebraska, but was then dismissed from the case.

In the initial phase of this case, the District Court of Lancaster County ruled generally in favor of petitioner, and respondents appealed to the Supreme Court of Nebraska (R. 25-26). In an opinion issued June 14, 1963 (Appendix A), the Supreme Court of Nebraska held that the contract between petitioner and respondents violated the Nebraska Installment Loan Act, that the contract was illegal and void, and that petitioner should refund to respondents all amounts paid to petitioner under the contract. Petitioner filed a motion for rehearing (S. R. 4), and the motion was argued on October 11, 1963 (S. R. 6). On November 15, 1963, while petitioner's motion for rehearing was still under consideration by the Supreme Court of Nebraska, the Nebraska Legislature drastically revised the Installment Loan Act, the general effect of the revision being to nullify the rulings of the Nebraska Supreme Court in cases of this type. The amending act contained a provision making it applicable to pending cases (Appendix B).

On November 21, 1963, petitioner filed a motion in the Supreme Court of Nebraska, asking leave to submit a brief showing the application of the new legislation to this case (S. R. 8-9). The motion was set for argument on December 2, 1963. On November 22, 1963, the day after the filing of the motion, and before there had been any hearing on the motion, the Supreme Court of Nebraska overruled petitioner's motion for rehearing (S. R. 10). Subsequently, on December 10, 1963, the court over-

ruled petitioner's motion for leave to file a supplemental brief (S. R. 11).

In connection with the overruling of petitioner's motion for rehearing, the Supreme Court of Nebraska issued a second opinion (Appendix A), directing the District Court of Lancaster County to undertake further proceedings in the case. After such further proceedings had been had, the District Court entered a judgment finding that the retail installment contract was illegal and void, despite the legislation adopted by the Nebraska Legislature on November 15, 1963 (R. 38-41). Petitioner appealed from this judgment to the Supreme Court of Nebraska (R. 49).

On May 28, 1965, the Supreme Court of Nebraska issued its opinion relative to the second appeal from the District Court (Appendix A). In this opinion the court ruled that it would not even consider the application to this case of the legislation adopted on November 15, 1963. The court held that it had, in effect, already determined this issue by overruling petitioner's motion for rehearing in connection with the first appeal.

Petitioner filed a motion for rehearing (R. 69), asserting that the Supreme Court of Nebraska, in violation of the due process clause of the Fourteenth Amendment, had effectively denied petitioner all opportunity for a hearing on a crucial question of law—the application of the ameliorative legislation to this case. The court overruled the motion for rehearing on July 9, 1965.

RAISING THE FEDERAL QUESTIONS

The federal question in this case arises by virtue of the peremptory procedure followed by the Supreme Court of Nebraska in connection with the first appeal to that court, and by virtue of the court's refusal to reconsider its peremptory ruling. While this case was pending in the Supreme Court of Nebraska, on the first appeal, the applicable statutes were drastically modified by the Nebraska Legislature. The amending act specifically provided that it should apply to pending cases. Petitioner thereupon filed a motion for leave to submit a brief showing the application of the amending act to this case. Without permitting petitioner to file such a brief, and without even giving petitioner a hearing on its motion for leave to file such a brief, the Supreme Court of Nebraska peremptorily overruled petitioner's motion for rehearing and remanded the case to the District Court of Lancaster County. Subsequently, the Supreme Court of Nebraska overruled petitioner's motion for leave to file a brief.

When the case reached the Supreme Court of Nebraska on the second appeal, petitioner included in its brief authorities supporting its argument that the amending act applies to this case, and petitioner cited authorities for the proposition that the Supreme Court of Nebraska should reconsider its peremptory ruling in connection with the first appeal. The court ruled, however, that no matter how peremptory and arbitrary its previous ruling had been, that ruling would not be reconsidered. Petitioner then filed a motion for rehearing, pointing out that the court had, in effect, deprived petitioner of all opportunity to be heard on a vital point of law, and that this denial

of a hearing violated the Fourteenth Amendment to the United States Constitution (R. 69). The Supreme Court of Nebraska overruled the motion for rehearing (R. 70).

REASONS FOR GRANTING THE WRIT

This case presents a question of fundamental importance in the area of procedural due process—namely, the right of a litigant to submit argument and legal authorities to the tribunal of decision before a final adjudication is made. This is a rather unusual question, to be sure, since the tradition of dealing with legal questions by means of written briefs and oral arguments is almost universally respected. The present case, however, presents an extraordinary set of circumstances.

In 1956, the Supreme Court of Nebraska rendered the first of a series of decisions, holding that transactions which the parties had conceived to be bona fide installment sales were, in legal effect, installment loans violating the Nebraska Installment Loan Act. *Powell v. Edwards*, 162 Neb. 11, 75 N. W. 2d 122. The penalty for such violation, fixed by the statute, was complete nullification of the buyer's legal liability for the portion of the purchase price to be paid in installments. R. R. S. 1943 (Reissue of 1960), Section 45-155. The present case is one of a large number of similar cases, in which persons buying goods on credit have sought to have their installment obligations declared void and uncollectible. Another case of this type was *Michigan National Bank v. Robertson, et al.*, 372 U. S. 591, in which this Court reversed a judg-

ment of the Nebraska Supreme Court on the basis of a question of venue.

During the seven years from 1956 to 1963, various legislative efforts were made in Nebraska, to clarify the distinction between installment loans and installment sales. Finally, on November 15, 1963, at a special session of the Nebraska Legislature, a statute was adopted, the purpose and effect of which were to nullify the decisions of the Supreme Court of Nebraska on this subject. A clause in this statute provided that the amendments should "apply to all transactions made prior to November 15, 1963" except "those transactions on which an action at law or in equity has been reduced to a final judgment as of November 15, 1963." Sec. 45-155.01, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965.

Within a week after the ameliorative statute was adopted, petitioner filed a motion in the Supreme Court of Nebraska, asking leave to file a brief showing the application of the new legislation to this case (S. R. 8-9). The legal basis for the position taken by petitioner was the case of *State ex rel. Caldwell v. Lincoln St. Ry. Co.*, 80 Neb. 352, 118 N. W. 326, wherein the Supreme Court of Nebraska held that its judgments do not become final until the motion for rehearing is overruled.

On the day after the filing of petitioner's motion for leave to file a supplemental brief, the Supreme Court of Nebraska overruled petitioner's motion for rehearing.

When the case came to the Supreme Court of Nebraska on the second appeal, petitioner again pressed its contention that the ameliorative legislative applies to this

case. This contention was noted by the Nebraska Supreme Court as follows:

> "Midwest further assigns error to this court in overruling its motion for a rehearing on its consideration of the previous appeal herein. It points out that the judgment of this court was not final until the disposition of its motion for rehearing. * * *" 135 N. W. 2d 460.

The Nebraska Supreme Court disposed of petitioner's contention with the following:

> "* * * After the determination of the present case in this court, the issuance of a mandate thereon, and a judgment in the trial court pursuant to its command, we will not thereafter review the questions determined by our previous decision." 135 N. W. 2d 462.

The effect of the ruling by the Nebraska Supreme Court is to deny petitioner all opportunity for a hearing on a point of law which might completely reverse the decision of that court.

A somewhat similar situation was presented to this Court in the case of *Brinkerhoff-Faris Trust & Savings Company v. Hill*, 281 U. S. 673. In that case, a bank complained that the local assessor had intentionally and systematically discriminated against the stockholders of the bank, by assessing the bank stock at full value, while assessing other property at less than full value. The Supreme Court of Missouri held that the bank's complaint should have been submitted to the state tax commission. In so holding, the Supreme Court of Missouri overruled a previous decision, in which it had held that the state tax commission had no jurisdiction over such matters.

Meanwhile, the time allowed for appealing to the state tax commission had expired. The bank filed a petition for rehearing, alleging that the decision of the Supreme Court of Missouri had the effect of depriving the bank's stockholders of property without due process of law. After the petition for rehearing was overruled, this Court granted certiorari and reversed the judgment of the state court. This Court said:

> "If the judgment is permitted to stand, deprivation of plaintiff's property is accomplished without its ever having had an opportunity to defend against the exaction. The state court refused to hear the plaintiff's complaint and denied it relief, not because of lack of power or because of any demerit in the complaint, but because, assuming power and merit, the plaintiff did not first seek an administrative remedy which, in fact, was never available, and which is not now open to it. Thus, by denying to it the only remedy ever available for the enforcement of its right to prevent the seizure of its property, the judgment deprives the plaintiff of its property."

In the present case, the Supreme Court of Nebraska refused to give petitioner a hearing at the time of the first appeal to that court, and the court again refused to consider petitioner's contention at the time of the second appeal. The court could have considered petitioner's claim in the course of the second appeal, but simply refused to do so.

A case very closely in point is *Railroad and Warehouse Commission v. Chicago and Northwestern Ry. Co.*, 256 Minn. 227, 98 N. W. 2d 60, in which a proceeding was initiated by the Railroad and Warehouse Commission for

the purpose of fixing rates for the hauling of certain commodities. At the close of the hearing, the attorney for the railroads asked permission to file a brief. The Commission refused to grant the requested permission. On appeal to the Supreme Court of Minnesota, the railroads attacked the order of the Commission on the ground that there had been a denial of due process of law. The Supreme Court of Minnesota sustained this objection. Paragraph 2 of the court's syllabus reads as follows:

> "Due process requires not only an opportunity to present evidence but an opportunity to be heard either by oral argument or written briefs."

In the present case, the Supreme Court of Nebraska refused to permit petitioner to file a brief at the time of the first appeal; and when the case again came to that court, on the second appeal, the court held that the issue on which petitioner sought a hearing was foreclosed by the decision in the first appeal.

CONCLUSION

This case presents an issue which is absolutely basic to the concept of due process of law. That issue is this: May a court refuse to give a litigant a hearing on a question of law, then make a ruling which is completely dependent on the disputed question, and then refuse to give any further consideration to the disputed question?

For the reasons stated herein, the petition for certiorari should be granted.

Respectfully submitted,

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By: _____
One of Said Attorneys

PROOF OF SERVICE

I, Joseph E. Dean, Jr., one of the attorneys for Midwest Laundry Equipment Corp., petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on Sept. 30, 1965, I served a copy of the foregoing Petition for Writ of Certiorari to the Supreme Court of Nebraska upon the respondents by depositing the same in a United States mail box, with air mail postage prepaid, addressed to Norman M. Krivosha, 911 Anderson Building, Lincoln, Nebraska, such being the address of said counsel of record for the respondents.

_____

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Milwaukee, Wisconsin

Counsel for Petitioner.

APPENDIX A

Opinions and Judgment of The Supreme Court of Nebraska

Opinion No. 1

Berg v. Midwest Laundry Equipment Corp.
No. 35409

Filed June 14, 1963

Heard before White, C. J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

BOSLAUGH, J.

This is an action to declare an alleged retail installment contract void and to recover all payments made under the contract. The plaintiffs, Maurice Berg and June Berg, are husband and wife. The defendants, Midwest Laundry Equipment Corp. and Industrial Credit Company, are corporations.

The trial court found that the contract was a valid installment sale, but that Industrial Credit Company had made certain charges in violation of the Installment Sales Act and assessed a penalty against it. The trial court held that the charges and the amount of the penalty should be deducted from the balance due under the contract and that the plaintiffs should pay the remaining installments due under the contract to Industrial Credit Company.

The plaintiffs' motion for new trial was overruled and the plaintiffs have appealed. The defendant Industrial Credit Company has cross-appealed.

The Midwest Laundry Equipment Corp. is engaged in the sale of laundry equipment which is used in the op-

eration of coin-operated, self-service laundry stores. Industrial Credit Company is engaged in the sales finance business. It is a Minnesota corporation and its principal place of business is in St. Paul, Minnesota.

The plaintiffs alleged that Industrial Credit Company was engaged in the business of making loans to residents of the State of Nebraska. The plaintiffs attempted to obtain jurisdiction over the person of Industrial Credit Company by having a summons served upon the Secretary of State of the State of Nebraska. Industrial Credit Company filed a special appearance in which it denied that it had been doing business in the State of Nebraska at any time. Thereafter, Industrial Credit Company attempted to preserve its special appearance. For the purpose of this opinion we assume that it did preserve its special appearance. The trial court overruled the special appearance and Industrial Credit Company has cross-appealed from that ruling.

Before a state can subject a foreign corporation to its jurisdiction, the corporation must have expressly consented to such jurisdiction or it must have done sufficient business in the state to constitute a submission to such jurisdiction. Jurisdiction over a foreign corporation which is actually doing business in Nebraska may be obtained by service of process upon the Secretary of State even though the corporation has not expressly consented to such jurisdiction. S. 21-1201, R. R. S. 1943; Brown v. Globe Laboratories, Inc., 165 Neb. 138, 84 N. W. 2d 151. It is a question of fact as to whether a foreign corporation is doing business in this state and each case must be decided upon its own facts.

The plaintiffs alleged that Midwest Laundry Equipment Corp. was employed as an agent by Industrial Credit Company for the purpose of soliciting loans to residents of Nebraska. Agency cannot be established by the acts or declarations of the alleged agent, but must be proved by the acts or declarations of the principal. Rodine v. Iowa Home Mutual Gas Co., 171 Neb. 263, 106 N. W. 2d 391. There is no evidence of any act or declaration of Industrial Credit Company to establish the agency alleged.

There is evidence that Industrial Credit Company has purchased 71 retail installment contracts from Midwest Laundry Equipment Corp. and that 18 of these contracts were executed by residents of Nebraska. What evidence there is as to how these contracts were purchased shows that contracts were offered to Industrial Credit Company by Midwest Laundry Equipment Corp., at St. Paul, Minnesota; that Industrial Credit Company was not obligated to purchase any of the contracts offered to it; that Industrial Credit Company made its own investigation as to the credit of the purchasers of the equipment; that Industrial Credit Company refused to purchase the contract executed by the plaintiffs when it was first offered to it by Midwest Laundry Equipment Corp.; and that the contract was finally purchased after it had been "rewritten" to show a much larger downpayment to Midwest Laundry Equipment Corp. than was actually made by the plaintiffs.

We conclude that the evidence fails to show that Industrial Credit Company was doing business in Nebraska, and its special appearance should have been sustained.

This disposes of the case so far as Industrial Credit Company is concerned.

The remaining questions concerns the right of the plaintiffs to recover the amounts paid to Midwest Laundry Equipment Corp. under the contract. That depends upon a determination as to the validity of the contract as between these parties. Since there is no jurisdiction over the person of Industrial Credit Company, no determination can be made as to the validity of the contract as between the plaintiffs and Industrial Credit Company in this action.

A time sale made in good faith is valid in this state, but a transaction which is in fact a loan made in violation of the Installment Loan Act is void. Powell v. Edwards, 162 Neb. 11, 75 N. W. 2d 122. It is a question of fact as to whether a particular transaction is a bona fide time sale or the financing of the balance of a cash purchase price. Trailmobile, Inc. v. Hardesty, 173 Neb. 46, 112 N. W. 2d 535. In determining whether a transaction is a bona fide time sale or a loan, the court will look through the form of the transaction and examine its substance. State ex rel. Beck v. Associates Discount Corp., 168 Neb. 298, 96 N. W. 2d 55. A transaction is not a valid time sale unless the buyer at the time of the sale was informed of and was given an opportunity to choose between a cash price and a valid time sale price. Wood v. Commonwealth Trailer Sales, Inc., 172 Neb. 494, 110 N. W. 2d 87.

The record shows that the plaintiffs talked with Raymond A. Erlandson, an employee of Midwest Laundry Equipment Corp., in November 1959, at Fargo, North

Dakota. The plaintiffs had answered a newspaper advertisement concerning self-service laundries. The first conversation concerned a store to be located at Grand Forks, North Dakota. The second conversation was about a store to be located at Minot, North Dakota. At the conclusion of the second conversation the plaintiffs paid $500 to Erlandson, and Maurice Berg signed a sale and purchase contract and a financial statement prepared by Erlandson.

The sale and purchase contract was an agreement for the purchase of 30 washers, 12 dryers, and related equipment necessary for the operation of a self-service laundry and was in the form of a contract of conditional sale. The contract provided for a total cash price of $22,437.45; a downpayment of $2,243.45, the balance of which was to be paid before shipment; an amount to be financed of $20,194; a time price differential of $3,937.83; the total amount of the note of $24,121.83; and a total time price of $26,365.28. The contract also provided: "$24,121.83 balance of time selling price to be evidenced by an installment note payable in 35 monthly installments of $670.00 each and a final payment of $671.83. * * * IF OTHER THAN A CASH SALE, THIS CONTRACT IS SUBJECT TO ACCEPTANCE BY THE SELLER AFTER APPROVAL OF PURCHASER'S CREDIT BY FINANCE FACTOR AT ITS HOME OFFICE. ACKNOWLEDGMENT TO THE PURCHASER BY LETTER OF ACCEPTABLE CREDIT BY THE FINANCE FACTOR SHALL BE DEEMED ACCEPTANCE BY THE SELLER."

Maurice Berg testified that Erlandson said that the contract and financial statement would be submitted to

the finance company for its approval. Erlandson testified that the "finance factor" referred to in the contract was Midwest Laundry Equipment Corp. Erlandson further testified that he explained to the plaintiffs that the cash price of the equipment was $22,437.45 and that the time price after payment of the full downpayment would be $24,121.83; and that the time price differential of $3,937.83 was obtained by multiplying the cash price less the downpayment by 6½ percent per year for 3 years.

About 3 weeks after the conversations with Erlandson, William W. Siebert, a salesman for Midwest Laundry Equipment Corp., called the plaintiffs by telephone. Siebert said that he had learned that two other stores were to be opened in Minot and that he did not think that the plaintiffs should go ahead with the plan to open a store in Minot.

A week or 10 days later Siebert again called the plaintiffs and stated that a location in Norfolk, Nebraska, was available. Paul A. Pothast, an employee of Midwest Laundry Equipment Corp., talked with the plaintiffs about the Norfolk location and the plaintiffs looked at the proposed location.

After the plaintiffs had looked at the proposed location in Norfolk, they met with Siebert at the office of Midwest Laundry Equipment Corp. in Omaha. During that conversation the plaintiffs agreed to purchase equipment for the store at Norfolk, signed a blank form of a sale and purchase contract, and paid some $1,900 to Siebert. The plaintiffs testified that they were not quoted a cash price and a time price for the equipment which

they agreed to purchase for the Norfolk store. Siebert testified that he did not recall discussing a cash price and a time price with the plaintiffs and that he knew their order was going to be a time-sale purchase when it came in. About 2 weeks after the conversation at Omaha, the plaintiffs received a copy of the sale and purchase contract.

In December, 1959, Maurice Berg was employed for a short time as a trainee salesman by Midwest Laundry Equipment Corp.

In February, 1960, Siebert came to the plaintiffs' home in Norfolk, Nebraska, and asked for their copy of the sale and purchase contract for the equipment for the Norfolk store. Siebert then destroyed their copy of the contract and stated that Industrial Credit Company had not accepted the financial statement of Maurice Berg. At this time the equipment had been delivered and its installation in the Norfolk store was nearly complete. Siebert then proceeded to write out a new sale and purchase contract with a retail installment contract, both of which were signed by the plaintiffs. The retail installment contract signed at Norfolk in February, 1960 was eventually assigned to Industrial Credit Company by Midwest Laundry Equipment Corp. and is the contract which is the subject of this action.

The new sale and purchase contract and the retail installment contract provided for a downpayment of $4,856.96. However, no additional amount was paid to Midwest Laundry Equipment Corp. by the plaintiffs. The only amounts that were ever paid to Midwest Laundry Equip-

ment Corp. were the amounts that had been previously paid. The new contracts provided for 35 monthly payments of $725 and a final payment of $743.28. The contracts recited a cash sale price of $26,713.28, cash downpayment of $4,856.96, amount to be financed $21,856.32, time price differential $4,261.92, total amount of note $26,118.24, and total time price of $30,380.16.

The evidence in this case, taken as a whole, shows that Midwest Laundry Equipment Corp. did not intend to make any sale other than a cash sale. In the event that a purchaser was unable to pay the full cash price, the sale was contingent upon Midwest Laundry Equipment Corp. being able to make suitable arrangements for the financing of the balance of the cash price. If financing could be arranged, the purchaser then signed a retail installment contract which was intended to appear to evidence a time sale but which in fact evidenced a loan for the payment of the balance of the cash price. The evidence concerning the "rewriting" of the contract at Norfolk in February of 1960, for the purpose of stating a higher downpayment than was actually made, is convincing evidence that the transaction in question was not a time sale made in good faith.

The contract in this case provided a charge of $4,261.92 to finance a balance of $21,856.32, the entire amount to be paid in 36 equal monthly installments. The Installment Loan Act as amended prohibits any charge in excess of 9 percent per annum where the indebtedness is in excess of three thousand dollars. S. 45-138, R. R. S. 1943. The charge which was made is in excess of 9 percent per

annum. The contract is therefore, void. Powell v. Edwards, *supra*.

The plaintiffs are entitled to judgment against Midwest Laundry Equipment Corp. for the $500 paid in November 1959, plus the balance of the downpayment paid in Omaha. Midwest Laundry Equipment Corp. is entitled to a credit in the amount of $725 which the plaintiffs admit having received from Midwest Laundry Equipment Corp. on or about May 3, 1960.

The record does not show the exact amount of the payment made in Omaha. The district court is authorized to receive further evidence, if necessary, to determine the amount of that payment.

The judgment of the district court is reversed and the cause is remanded for further proceedings, if necessary and with directions to enter a judgment in conformity with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

Opinion No. 2

Berg v. Midwest Laundry Equipment Corp.

No. 35409

Filed November 22, 1963

Heard before White, C. J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

BOSLAUGH, J.

The appellee, Midwest Laundry Equipment Corp., has filed a motion for rehearing in which it contends that the

appellants are not entitled to recover the amounts paid to it upon the contract for the purchase of the laundry equipment even though the contract is void. This question was not raised in the briefs or argument in this court until the motion for rehearing was filed.

Upon further consideration of the matter, we are now of the opinion that the cause should be remanded to the district court with directions to determine the amount of the payments made by the appellants to the Midwest Laundry Equipment Corp. and whether the appellants should recover this amount from the Midwest Laundry Equipment Corp. in view of our determination concerning the validity of that contract.

Our opinion in this case filed on June 14, 1963, is modified accordingly. The motion for rehearing is overruled.

ORIGINAL OPINION MODIFIED.

MOTION FOR REHEARING OVERRULED.

Opinion No. 3

Berg v. Midwest Laundry Equipment Corp.

No. 35888

Filed May 28, 1965

Heard before White, C. J., Carter, Spencer, Boslaugh, Brower, Smith, and McCown, JJ.

BROWER, J.

Plaintiffs Maurice Berg and June Berg, husband and wife, hereinafter referred to as the plaintiffs, brought this

action in the district court for Lancaster County against the defendants Midwest Laundry Equipment Corp. and Industrial Credit Company to declare a retail installment contract void as usurious and recover payments made by them thereon.

This is the second appearance of this case in this court. The previous opinion appears in Berg v. Midwest Laundry Equipment Corp., 175 Neb. 423, 122 N. W. 2d 250, where the facts involved are set forth. A supplemental opinion entered after a motion for a rehearing appears in 175 Neb. 874, 124 N. W. 2d 699.

At the first trial in the district court, the trial court overruled a special appearance of the defendant Industrial Credit Company objecting to jurisdiction over its person. That court held the installment sales contract in question valid but that the Industrial Credit Company had made certain charges in violation of the Installment Sales Act and assessed a penalty to be deducted from the balance due upon the contract. It adjudged that the plaintiffs pay the installments which remained thereon to Industrial Credit Company.

Our opinion in Berg v. Midwest Laundry Equipment Corp., 175 Neb. 423, 122 N. W. 2d 250, filed herein June 14, 1963, held the special appearance of Industrial Credit Company should have been sustained, that the retail installment contract actually evidenced a loan for the balance of the purchase price, and being usurious was void under section 45-138, R. R. S. 1943. It further held that the evidence showed the defendant Midwest Laundry Equipment Corp., hereafter at times referred to as Midwest, did not

intend to make a sale except a cash sale and that plaintiffs were entitled to judgment against it for two payments made, less a credit of $725 which was admitted to have been received by plaintiffs from Midwest. The amount of one of the two payments made not being disclosed by the record, the district court was authorized to receive further evidence to determine the amount thereof. The judgment of the trial court was reversed and the cause remanded with directions to enter judgment in conformity with the opinion.

The defendant Midwest timely filed a motion for rehearing in this court objecting to the opinion of the court, among other things contending that the downpayment to the retail seller Midwest was no part of the installment loan contract. It contended this court erred in ordering this downpayment refunded. The supplemental opinion of this court filed November 22, 1963, Berg v. Midwest Laundry Equipment Corp., 175 Neb. 874, 124 N. W. 2d 699, directed the trial court to determine both the amount of the payments to Midwest and whether it should recover their amount on the determination.

Meantime on November 21, 1963, Midwest filed a motion calling attention to the enactment of statutes at the extraordinary session of the Legislature bearing on the issues involved in the litigation and asking leave to brief the same. The motion was denied by this court on December 10, 1963.

The mandate of this court was issued December 13, 1963, with our opinion and supplemental opinion attached. Both parties moving for judgment on the mandate, hear-

ings were held and thereafter the trial court sustained the special appearance of Industrial Credit Company. It further held that the retail installment contract between the parties was void and uncollectible, and enjoined Midwest and its successors from collecting the same. Midwest was ordered to return two downpayments made to it in the total amount of $2,243.45 with interest from the respective dates of payment. It found that by stipulation of the parties, the $725 payment referred to in the opinion of this court had been disposed of by agreement between the parties and need not be further considered. The motion of Midwest to vacate the judgment and for a new trial being overruled, it has brought the matter to this court on appeal.

Midwest assigns error to the trial court in finding the installment sales contract void and uncollectible. It contends that under sections 45-137, 45-138, 45-154, and 45-155, R. R. S. 1943, as amended by Laws 1963, Special Session, chapter 9, page 103 (L. B. 17), a loan made in violation of the Installment Loan Act as it existed prior to the amendment of these sections is no longer void although any interest or charges collected should be forfeited and refunded to the borrower. In this respect it cites Davis v. General Motors Acceptance Corp., 176 Neb. 865, 127 N. W. 2d 907, where this court held this statute to be valid and constitutional legislation and to effectively repeal the provisions in the original Installment Loan Act which rendered loans made in violation thereof void and uncollectible, and that because of the expressed intention of the Legislature, the repeal was given retroactive effect. In Jurgensen v. Ainscow, 160 Neb. 208, 69 N. W. 2d 856,

this court held: "Public interest requires that there shall be an end to litigation, and when a cause has received the consideration of this court, has had its merits determined, and has been remanded with specific directions, the court to which such mandate is directed has no power to do anything other than to enter judgment in accordance with such mandate." To the same effect see Regouby v. Dawson County Irr. Co., 128 Neb. 531, 259 N. W. 365. The trial court had no alternative under the mandate but to enter the judgment it did in this respect and committed no error in so doing.

Midwest further assigns error to this court in overruling its motion for a rehearing on its consideration of the previous appeal herein. It points out that the judgment of this court was not final until the disposition of its motion for rehearing. State ex rel. Caldwell v. Lincoln Street Ry. Co., on rehearing, 80 Neb. 352, 118 N. W. 326; Revised Rules of the Supreme Court, Rule No. 22a. It calls attention to its motion addressed to this court seeking permission to file a brief on the applicability of the recent remedial legislation before our decision became final. Further, it asserts this court on the second appeal between the same parties may review and reverse its former decision and has done so in certain instances. It cites City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955, 34 L. R. A. 321, which case was before this court several times. Foxworthy as plaintiff had sued the City of Hastings for injuries incurred in falling on a sidewalk. The City answered that plaintiff had failed to file action within 6 months from the date of the accident as required by the statute. Plaintiff demurred to the answer. The trial court

sustained the demurrer. This court on the first appeal held that the section of the statute requiring action to be brought within 6 months was unconstitutional. It reversed the judgment and remanded the cause generally for trial. The statute then under consideration had a further provision requiring filing of a statement with the city clerk showing the date of the injury and certain matters concerning it within 6 months of the injury. Between the time of the reversal on the first appeal and the decision of this court in City of Hastings v. Foxworthy, *supra,* this court had held in other cases that such a provision was valid, that the giving of the statement was a condition precedent to maintaining the action, and was required to be alleged and proved. In the cited case the court held the demurrer to the answer should have searched the record and disclosed the failure of the petition to state a cause of action. The judgment was thereupon reversed and the petition dismissed, the rule of law set out stating: "An appellate court, on a second appeal of a case, will not ordinarily re-examine questions of law presented by the first appeal, but where the case was on the first appeal remanded generally for a new trial and the same questions are presented on the second trial, the appellate court is not bound to follow opinions on questions of law presented on the first appeal and may re-examine and reverse its rulings on such questions, and should do so when the opinion first expressed is manifestly incorrect."

Midwest seizes on certain statements in the long opinion in the Foxworthy case discussing many cases and aspects of the law applicable from which it contends this court should review all questions coming before it on a

subsequent appeal that by reason of a change in the law might be decided anew. In the Foxworthy case, however, there had been a general remand for a new trial. The previous ruling had sustained a demurrer to the answer and it was only by the application of the rather technical legal rule that a demurrer searches the record that it could even be inferred that the previous opinion of the court had determined that the original petition had stated a cause of action. A careful reading of the Foxworthy case clearly shows no intent to go beyond the rule stated.

Midwest cites also the case of Eccles v. Walker, 75 Neb. 722, 106 N. W. 977. There the Supreme Court had previously reversed the judgment of the trial court which had dismissed the action. The court called attention to the fact that it had previously remanded the cause for trial generally and applied the rule in the Foxworthy case permitting it to arrive at a new and different decision. It did not enlarge upon that rule.

Midwest also calls attention particularly to Stratton v. Bankers Life Co., 102 Neb. 755, 169 N. W. 722, 1 A. L. R. 1671. It points out this case was decided differently on the second appeal in spite of the directions to enter a judgment on certain issues at the first hearing of this case in this court. The opinion states that the appellate court will not ordinarly reexamine questions once determinued by it but the case comes within the exceptions of City of Hastings v. Foxworthy, *supra*. The first opinion in the Stratton case is apparently not reported and the substance of the pleading is not disclosed. The real basis of the decision seems to be that the former decision was "manifestly outside of the pleadings." It has been held

by this court in Drieth v. Dormer, 148 Neb. 422, 27 N. W. 2d 843, that: "The judgment of a court upon a subject within its general jurisdiction, but which is not brought before it by any statement or claim of the parties and is foreign to the issues submitted for determination, is a nullity." See, also, Petersen v. Dethlefs, 139 Neb. 572, 298 N. W. 155, where this court held: "A finding or other part of a judgment foreign to any pleading and not necessary to the relief grantable to any litigant in a case is contrary to the course of the law and the practice of the courts, is void and should be stricken from the record on motion." If the first decision was outside the pleading as stated, the ground of the second ruling is apparent. We do not think this case should be the basis of extending the rule in City of Hastings v. Foxworthy, *supra*, and applying it to the case before us.

In the case of Burnham v. Bennison, 130 Neb. 558, 265 N. W. 531, this court held: "The appellate court may, on the second appeal between the same parties, if justice requires, review and reverse its former decision; but the parties are not entitled to such review as a matter of right; such practice will be resorted to sparingly, and only in cases where cogent reasons exist therefor.

"The appellate court, on a second appeal between the same parties, will not ordinarily reexamine questions of law presented in the first appeal, as the matters decided therein come within the rule of stare decisis, and become the law of the case.

"On a second appeal between the same parties in the same cause, where the second appeal merely seeks to re-

litigate questions settled by the opinion in the former appeal, this court will not inquire into the merits of its former opinion, where it appears that the second appellants sought a rehearing in the former appeal, which was denied, and the cause reversed and remanded, with directions to the lower court to render judgment in accordance with the opinion." In the opinion it is stated: "Appellants seem to rely upon the case of City of Hastings v. Foxworthy, 45 Neb. 676, 63 N. W. 955. This case contains an exhaustive and elaborate discussion of a number of cases in which the rule of stare decisis was presented, and in a well-considered opinion it announced the following rule: * * *. (Setting forth the rule quoted in Foxworthy.) It will be noted in the case above mentioned that the rule applied arose in a case where on the first appeal the case was reversed and remanded for a new trial. Such is not the fact as presented by the record here. The case was reversed and remanded, not for new trial, but was remanded with specific directions to a trial court to enter judgment in accordance with the opinion." See, also, Gund v. Ballard, 80 Neb. 385, 114 N. W. 420; Jurgensen v. Ainscow, *supra*.

In the case before us our opinion of June 14, 1963, held the installment sales contract was void and reversed the judgment in that respect. It remanded the cause permitting the trial court to determine only the amount of the downpayment for the purpose of entering judgment for the plaintiff for that also. The supplemental opinion of November 22, 1963, modified the original opinion only to the extent of directing the trial court to determine whether the downpayment after it was determined should

be recovered by plaintiffs. In Kometscher v. Wade, 177 Neb. 299, 128 N. W. 2d 781, this court determined it would not reverse a judgment of the trial court entered previously to the enactment of Laws 1963, Special Session, chapter 9, page 103 (L. B. 17), because of the changes made in that law. We think the rule in City of Hastings v. Foxworthy, *supra*, should be adhered to and not extended. After the determination of the present case in this court, the issuance of a mandate thereon, and a judgment in the trial court pursuant to its command, we will not thereafter review the questions determined by our previous decision.

Midwest further assigns error to the trial court in ordering it to refund the downpayments of $2,243.45 and interest to the plaintiffs. This aspect of the case was left for the determination by the trial court in our supplemental opinion. The statute determinative of this matter as it existed prior to its amendment by Laws 1963, Special Session, chapter 9, section 2, page 108 (L. B. 17), was section 45-138, R. R. S. 1943. The portion setting forth the effect of a violation of the provisions thereof reads as follows: "Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan." It refers to the *"loan"* and provides that the loan shall be void and that the licensee shall have no right to collect or receive any principal, interest, or charges *"on such loan."* Plaintiffs contend the word "charges" included in this phrase means any payment exacted or received by the seller and includes the downpayment. We believe, however, it refers to

charges as used in section 45-139, R. R. S. 1943, which are permitted to be included in an installment loan. It does not mention the downpayment made on the purchase. The downpayments in this instance were made in November 1959 and January 1960. The installment sales contract was not signed until February 19, 1960. In Misle v. Miller, 176 Neb. 113, 125 N. W. 2d 512, this court said: "A penalty statute must be strictly construed. It will not be applied to situations or parties not fairly or clearly within its provisions." We are referred to many cases where certain statements in the opinions are urged by the respective parties herein as indicative of their desired interpretation of the section. They appear to be obiter dicta. We are referred to no case where the downpayment was adjudged to be invalid. Neither have we found such a case. The reports are, however, replete with cases where the principal, interest, and charges on the loan itself were recovered and the downpayment was not mentioned. We conclude the plain wording of section 45-138, R. R. S. 1943, before its amendment by Laws 1963, Special Session, chapter 9, section 2, page 108 (L. B. 17), rendered void only the payments of principal, interest, and charges included in the loan and did not affect a downpayment which was no part thereof. We conclude the trial court erred in ordering it returned to the plaintiffs in its judgment.

It follows that the judgment of the trial court should be reversed and the cause remanded insofar as it provides for the payment to the plaintiffs of the $2,243.45 and interest, and should be and is affirmed in all other respects.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED.

JUDGMENT

And afterwards, to wit, on the 28th day of May, 1965, there was rendered by said Supreme Court of Nebraska and entered of record upon Journal TTT thereof, at page 303, a certain Judgment in the words and figures following, to wit:

This cause coming on to be heard upon appeal from the district court of Lancaster County was argued by counsel and submitted to the court; upon due consideration whereof, the court finds error in that part of the judgment of said district court which ordered defendant, Midwest Laundry Equipment Corporation to refund to the plaintiffs the down payment of $2,243.45 and interest, and in this respect said judgment is reversed and the cause remanded and in all other respects said judgment is affirmed; that appellant recover of and from plaintiff appellee its costs herein expended, taxed at $194.00; for all of which execution is hereby awarded and that a mandate issue accordingly.

APPENDIX B

Nebraska Statutes

Section 45-138, R. R. S. 1943 (Reissue of 1960):

45-138. *Installment loans; loans in excess of three thousand dollars; preexisting debt; loan period; violation.* (1) No licensee shall directly or indirectly charge, contract for, or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part of (sic) all of any aggregate indebtedness of the same ~~person~~, in excess of three thousand dollars.

(2) The prohibition contained in subsection (1) of this section shall also apply to any licensee who permits any person, as borrower or as endorser, guarantor, or surety for any borrower, or otherwise, or any husband and wife jointly or severally, to owe directly, contingently, or both to the licensee at any time a sum of more than three thousand dollars for principal; *Provided,* that if a licensee shall acquire, directly or indirectly, by purchase or discount, bona fide obligations for goods or services owed by the person who received such goods or services, then the amount of such purchased or discounted indebtedness to the licensee, referred to in subsections (1) and (3) of this section, shall not be included in computing the aggregate indebtedness of such borrower to the licensee for the purpose of the foregoing prohibitions; *and provided further,* that if the proceeds of any loan of three thousand dollars or less, referred to in subsections (1) and (3) of this section, are used to discharge a preexisting debt of the borrower for goods or services owed directly to the person who provided such goods or services, the licensee may accept from such person a guaranty of payment of the principal of such loan, with interest at a rate not exceeding that which the licensee could lawfully charge if he were not licensed hereunder. The acceptance of one or more of such guaranties in any aggregate amount shall not affect the rights of such licensee to make the charges against the borrower authorized by section 45-137.

(3) No licensee shall enter into any contract of loan, referred to in subsection (1) or (2) of this section, under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than thirty-six calendar months from the date of making such contract, referred to in subsection (1) or (2) of this section, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, or under which the borrower

agrees to make payment of principal more than thirty-six calendar months from the date of making such contract, if the contract of loan is secured by a bona fide duly recorded mortgage on real estate owned by the borrower. Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment. When necessary in order to facilitate payment in accordance with the debtor's principal source of income, a debtor, whose principal source of income is from agriculture, stock raising, or school teaching, the payment schedule may reduce or omit installment payments. if at least one half of the credit is to be repaid within the first half of the applicable maximum maturity and if the other payments are increased in such manner that they will be susbstantially equal or declining in amount and sufficient in the aggregate to retire the loan in the period of thirty-six months, as provided for in this subsection. Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall be void and the licensee shall have no right to collect or receive any principal, interest, or charges on such loan.

Section 45-138, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965:

45-138. *Installment loans; loans in excess of three thousand dollars; preexisting debt; loan period; violation.* (1) No licensee shall directly or indirectly charge, contract for, or receive a greater rate of interest than nine per cent per annum upon any loan, or upon any part of (sic) all of any aggregate indebtedness of the same person, in excess of three thousand dollars.

(2) The prohibition contained in subsection (1) of this section shall also apply to any licensee who per-

mits any person, as borrower or as endorser, guarantor, or surety for any borrower, or otherwise, or any husband and wife jointly or severally, to owe directly, contingently, or both to the licensee at any time a sum of more than three thousand dollars for principal; *Provided,* that if a licensee shall acquire, directly or indirectly, by purchase or discount, bona fide obligations for goods or services owed by the person who received such goods or services, then the amount of such purchased or discounted indebtedness to the licensee, referred to in subsections (1) and (3) of this section, shall not be included in computing the aggregate indebtedness of such borrower to the licensee for the purpose of the foregoing prohibitions; *and provided further,* that if the proceeds of any loan of three thousand dollars or less, referred to in subsections (1) and (3) of this section, are used to discharge a preexisting debt of the borrower for goods or services owed directly to the person who provided such goods or services, the licensee may accept from such person a guaranty of payment of the principal of such loan, with interest at a rate not exceeding that which the licensee could lawfully charge if he were not licensed hereunder. The acceptance of one or more of such guaranties in any aggregate amount shall not affect the rights of such licensee to make the charges against the borrower authorized by section 45-137.

(3) No licensee shall enter into any contract of loan, referred to in subsection (1) or (2) of this section, under sections 45-114 to 45-155, under which the borrower agrees to make any payment of principal more than thirty-six calendar months from the date of making such contract, referred to in subsection (1) or (2) of this section, if such contract is not secured by a bona fide duly recorded mortgage on real estate owned by the borrower, or under which the borrower agrees to make payment of principal more than thirty-six calendar months from the date of making such

contract, if the contract of loan is secured by a bona fide duly recorded mortgage on real estate owned by the borrower. Every loan contract shall provide for repayment of principal and charges in installments which shall be payable at approximately equal periodic intervals of time and so arranged that no installment is substantially greater in amount than any preceding installment. When necessary in order to facilitate payment in accordance with the debtor's principal source of income a debtor, whose principal source of income is from agriculture, stock raising, or school teaching, the payment schedule may reduce or omit installment payments, if at least one half of the credit is to be repaid within the first half of the applicable maximum maturity and if the other payments are increased in such manner that they will be substantially equal or declining in amount and sufficient in the aggregate to retire the loan in the period of thirty-six months, as provided for in this subsection. Any contract of loan made in violation of this section, either knowingly or without the exercise of due care to prevent the same, shall not on that account be void, but the licensee shall have no right to collect or receive any interest or charges on such loan. If any interest or other charges have been collected, the licensee shall forfeit and refund to the borrower all interest and other charges collected on the loan involved.

Section 45-155, R. R. S. 1943 (Reissue of 1960):

45-155. *Licensees; violations; effect.* Violation of sections 45-114 to 45-155 in connection with any indebtedness, however acquired, shall render such indebtedness void and uncollectible.

Section 45-155, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965:

45-155. *Licensees; violations; effect.* Violation of sections 45-114 to 45-155 in connection with any

indebtedness, however acquired, shall not render such indebtedness void and uncollectible. If however, any interest or other charges have been collected on such indebtedness, all interest and other charges shall be forfeited and refunded.

Section 45-155.01, R. S. Supp. 1963, Cumulative Pocket Part Supplement, April, 1965:

45-155.01. *Loan transactions prior to November 15, 1963; penalty provisions.* Except as to those transactions on which an action at law or in equity has been reduced to a final judgment as of November 15, 1963, the penalty provisions of section 45-137, enacted by the Seventy-third Session of the Legislature of Nebraska and as further amended by this act and the penalty provisions of sections 45-138, 45-154 and 45-155, shall apply to all transactions made prior to November 15, 1963.